1953

In the Matter of the Adoption of Gerald Asel Walton and John Earl Walton : Brief of Appellant

Utah Supreme Court

In the Supreme Court
of the State of Utah

In The Matter of the Adoption of GERALD ASEL WALTON and JOHN EARL WALTON,

Minors.

Case No. 7933

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

This is an appeal from a judgment and decree entered in the district court of Salt Lake County, after a contested trial. The court found that Appellant had abandoned and deserted his children, John Earl Walton and Gerald Asel Walton. The district court decreed the adoption of the children by Respondents.

STATEMENT OF FACTS

Appellant, Gerald B. Walton, the father of Gerald Asel Walton and John Earl Walton, and Respondent, Mrs. Caroline

Walton Worthen, were married in Nebraska in 1938 (R. 10). After their marriage they lived for a few months in Utah. Then they moved to Nevada and lived there for approximately two and one-half years. The children here in question were born to them while they lived in Nevada (R. 16). Mr. and Mrs. Walton moved from Nevada to Arkansas where they lived together until the spring or summer of 1944 (R. 10). In 1944 Mrs. Walton left Mr. Walton and brought her children, Gerald Asel Walton and John Earl Walton, to Salt Lake City, Utah to live. After Mrs. Walton left Arkansas Mr. Walton obtained a divorce from her in Askansas (R. 8).

Mrs. Walton lived in Salt Lake City with John and Gerald from 1944 until July of 1947. In July of 1947 John and Gerald went to Arkansas and lived with their father for one year. From July of 1948 until January of 1949 John and Gerald lived with Mrs. Walton in Salt Lake City. In January of 1949 Mrs. Walton married her present husband and the children have lived with them since that time.

When Mrs. Walton arrived in Utah in 1944, she accepted employment in order to provide for her children (R. 11). She did not earn enough to enable her to meet the expenses of herself and her family and there were times when she wrote to Mr. Walton and requested financial assistance (R. 20, 57). It appears that Mr. Walton sent money to her in response to each of her requests (R. 20). The record shows that Mr. Walton sent Mrs. Walton money with which to help support John and Gerald on approximately 15 occasions in the three year period from 1944 to July of 1947 (R. 41, 58). He also gave Mrs. Walton $100.00 when he was in Salt Lake

City in 1945 and he paid some of her expenses in amounts not specified (R. 40).

During the years between 1944 and 1947, Appellant was ill much of the time (R. 40). He borrowed money in order to meet some of Mrs. Walton's requests for aid (R. 41), and he sent Mrs. Walton money on some occasions when it was not requested (R. 58). During part of the time when he sent assistance to Mrs. Walton, he sent it through a third person because Mrs. Walton would not tell him where she was (R. 41).

In July of 1947 Mrs. Walton sent the two boys to Arkansas for six months to live with their father (R. 21). At the expiration of which time he was to have returned them to Salt Lake City. He refused to do that (R. 21) and Mrs. Walton travelled to Arkansas and returned with them to Salt Lake City (R. 20).

In October of 1948, Mrs. Walton sought and obtained a decree from the District Court for Salt Lake County awarding her the exclusive custody of the children here in question (R. 7, 8, 10).

Appellant was not a party to the decree of 1948, he was not personally served, nor did he waive service of process (R. 9). The decree appealed from does not rely on the 1948 decree as the basis for the granting of the petition of adoption (R. 61, 62).

Between July 1948 and the bringing of this action, Appellant had seen the children, John and Gerald, three or four times (R. 30). Appellant travelled to Salt Lake City to see his sons, but insofar as the Respondents were able to do so,

they prevented Mr. Walton from spending any time with John and Gerald (R. 46). Appellant visited the Respondents in March of 1950 and inquired if there was not some way in which a settlement could be reached so that he could see his children (R. 46). At that time he was told to go away and leave the Respondents alone (R. 46). Mr. Walton was in Salt Lake City in February of 1952 and tried to see his children. but again was prevented by the Respondents from seeing them (R. 46).

Mr. Walton sent John and Gerald presents for their birthdays and for Christmas while they lived with the Worthens (R. 36, 41). He sent them presents at times other than those occasions (R. 42).

On April 6, 1952, Respondents filed a petition to have the children declared abandoned and deserted and to adopt them. At the trial, the Judge called for the report of the Department of Public Welfare (R. 7) and the Judge read the report during the course of the trial.

On October 28, 1952, the District Court of Salt Lake County determined that the children had been abandoned and deserted and decreed their adoption by Respondents (R. 61).

STATEMENT OF POINTS

I.

APPELLANT CONTENDS THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT THE APPELLANT ABANDONED AND DESERTED HIS CHILDREN.

II.

THE REPORT OF THE DEPARTMENT OF PUBLIC WELFARE SHOULD NOT BE CONSIDERED AS EVIDENCE IN THIS CASE.

ARGUMENT

I.

APPELLANT CONTENDS THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT THE APPELLANT ABANDONED AND DESERTED HIS CHILDREN.

Our statutes provide that a child may be adopted without the consent of either parent when the district court of the county where the person petitioning for an adoption resides, determines that the child in question has been deserted, 78-30-5 Utah Code Annotated, 1953. The Supreme Court of Utah has ruled many times on cases which have involved the custody of children. Issues involved in child custody cases set forth in *Walton v. Coffman,* 110 Utah 1, 169 P. 2d 97 in a manner which renders any further attempt to deal with that subject superfluous. This case does not involve the rights of the parties to the custody of the children here in question. The decision of the court in this case as to whether or not the children have been abandoned or deserted by the Appellant cannot be derived from questions bearing upon the welfare of the children. *Sherry v. Doyle*, 68 Utah 74, 249 P. 250, 253. The question of the welfare of the children is not reached in a pro-

ceeding of this nature until it is determined that there has been an abandonment or a desertion. *In re Adoption of Strauser,* 196 P. 2d 862; *In Re Cozza,* 163 Cal. 514, 126 P. 161; *In Re Kelly,* 25 Cal. App. 651, 145 P. 156. See also: *In Re Snowball's Estate,* 156 Cal. 240, 104 Pac. 444.

The only issue in this case is whether or not Appellant had abandoned or deserted the children so as to render his consent to the adoption unnecessary. Appellant has not found any Utah case which has defined the word deserted as used in 78-30-5, U.C.A. 1953. Most of the Utah cases dealing with child custody are cited in *Walton v. Coffman* and most of them arise from habeas corpus proceedings. In those cases, the court refers to the loss of the parents' rights to custody either by agreement or conduct. *Walton v. Coffman,* supra. The word desert is used in a recent Utah case, *Taylor v. Waddoups,* 241 P. 2d 157, 161 but it is not defined.

In several of the Utah cases, the court seems to have been talking about desertion rather than abandonment, as defined in *Jensen v. Early,* 63 Utah 604, 228 P. 217. But the court used the terms abandonment, forfeiture, or surrender of legal rights rather than the term desertion. *Walton v. Coffman,* supra. *Stanford v. Gray,* 42 Utah 228, 129 P. 423. *Wallick v. Vance,* 76 Utah 209, 289 P. 103. *Hummel v. Parrish,* 43 Utah 373, 134 P. 298. Appellant has found very often the word desert is defined in terms of abandon. See: *Finn v. Reese,* 141 P. 2d, 976, an Idaho case. *Words and Phrases,* Desertion, P. 248, Vol. 12; 39 *Am. Jur.* 1046. *Black's Law Dictionary,* Third Edition, p. 565.

Adoption is statutory, and the courts say that the consent lies at the foundation of the statute. *In Re Adoption of Strauser,* supra., and the many cases cited therein. "In an adoption proceeding when a parent refuses to consent, and the matter in controversy is whether he had abandoned the child so as to dispense with the necessity of his consent, the burden of proof is on the party seeking to justify the adoption on that ground and the courts often say that the evidence to show abandonment must be clear and convincing. See: *In Re Bistany,* 209 App. Div. 286, 204 N.Y.S. 599; *In Re Kelly,* supra.; *Petition of Rice,* 179 Wis. 531, 192 N.W. 56; *Mastrovich v. Mavric,* 66 S.D. 577, 287 N.W. 97." *In Re Strauser,* supra.

"An abandonment is a question of intention, which must be shown by a clear unequivocal, and decisive act of the party —an act done that shows a determination not to have the benefit to which he is entitled. *Breedlove v. Stump,* 11 Tenn. (3 Yerg) 257, 276. Abandoment, in such cases, ordinarily means that the parent has placed the child on some doorstep or left it some convenient place in the hope that someone will find it and take charge of it, or has abandoned it entirely to chance or fate." *Taylor v. Waddoups,* supra, quoting from *Jensen v. Early,* supra. See also: *In Re Cozza,* supra. *In Re Kelly,* supra. *In Re Snowball's Estate,* supra.

There is nothing in the record of this trial which shows any act of abandonment on the part of Appellant. Mrs. Walton took the children from Appellant's home in 1944 (R. 17). From July of 1947 to July of 1948, Mr. Walton cared for the children in his home. When they, the children, left Arkansas in 1948 it was because Mrs. Walton took them from Mr. Wal-

ton (R. 20). Neither is there sufficient evidence in the record from which to find that Mr. Walton deserted his children. From 1944 until July of 1947, Appellant responded to every request for help made by Mrs. Walton and volunteered considerable assistance.

Following Mrs. Walton's marriage to Mr. Worthen, the Worthens did not ask for any assistance from Appellant. They refused his gifts to his children and asked him to leave them. Respondents and the children, alone. It does not follow from that that Appellant deserted his children, rather he was driven away from them.

Appellant desires to call the Court's attention to an error in the record. The decree of the district court appealed from refers to the action brought by Mrs. Walton in 1948 as a divorce decree (R. 61). That is not correct (R. 7, 8, 10). It was an action brought by Mrs. Walton to have the exclusive custody of the children decreed to her (R. 8). This point is not argued further because the court did not rely on that decree in its judgment in the action from which this appeal is taken.

II.

THE REPORT OF THE DEPARTMENT OF PUBLIC WELFARE SHOULD NOT BE CONSIDERED AS EVIDENCE IN THIS CASE.

Appellant contends that the report of the Department of Public Welfare should not be considered on the issue of this case. Title 78-30-14 requires the Department of Public

Welfare to make a report to the court on certain subjects when a petition for adoption is filed and a written consent of a licensed child-placing agency is not filed with the petition for adoption. The Department must report on whether the natural parents have abandoned such child or are morally unfit to have its custody.

It is Appellant's contention that that report was intended by the Legislature to advise the court as to the wisdom of allowing the petition for adoption. It was not intended to be used as evidence on the question of abandonment in contested cases such as this.

Appellant does not know what is contained in the report of the Department of Public Welfare. It is the Appellant's position that whatever the contents of this report, it cannot under elementary rules of evidence, be considered by the trial court in resolving the question of abandonment nor, do we believe, that this Court may consider that report in determining whether there is sufficient evidence to support the findings of the trial court. This report is not only hearsay, but Appellant at no stage of the proceeding has had the opportunity to cross-examine on any evidence that might be therein contained.

CONCLUSION

Appellant respectfully submits that he has not deserted or abandoned his children. Rather he has manifested a real concern and sense of responsibility for his children and a desire to retain his natural relationship with them. Certainly he did not abandon or desert them prior to January of 1949. Since

1949 he has been prevented by Respondents from assuming his rightful role as the father of these two boys. A desertion or abandonment by Appellant cannot result from acts of the Respondents which prevented Appellant from associating with his sons. This Court should not sever the natural relationship of the Appellant with his sons under the facts of this case.

Respectfully submitted,

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